

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-257**

BURNETTE-CARTER COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 15, 1978.

OPINIONS BELOW

The copy of the opinion of the District Court for the Western District of Tennessee appears in the Appendix at pp. A-2-A-7.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 575 F.2 587 (1978), a copy of which appears in the Appendix at pp. A-8-A-18.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered May 15, 1978, and a copy thereof appears in the Appendix at p. A-8.

The Court of Appeals for the Sixth Circuit denied Burnette-Carter Company's petition for rehearing and suggestion for rehearing en banc, and an order denying said petition was entered July 5, 1978, a copy of which appears in the Appendix at p. A-19.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the law of the tort of conversion is governed by federal common law where the United States loaned money to a farmer under the Bankhead-Jones Farm Tenant Act and was granted a security interest in said farmer's cattle, the notice of which security interest was duly recorded in Mississippi, and where said cattle were later sold in Tennessee by a livestock broker without knowledge of said security interest.

2. Whether a security interest granted to the United States by a borrower of funds under the Bankhead-Jones Farm Tenant Act, which security interest was perfected in Mississippi, is given absolute protection in Tennessee for four months after property subject to said perfected security interest entered Tennessee.

STATEMENT OF THE CASE

On December 15, 1975, the United States of America (hereinafter "United States") filed suit in the United States District

Court, Western District of Tennessee, against Burnette-Carter Company (hereinafter "Burnette-Carter"), a commission livestock broker, to recover damages for the alleged conversion of mortgaged property. Jurisdiction was based upon 28 U.S.C. §1345 which provides that district courts have original jurisdiction of all civil actions brought by the United States.

Both parties moved for summary judgment, each conceding that there were no genuine issues of material fact. The facts about which there was no dispute are that George T. Johnson borrowed \$33,670.00 from the United States through the Farmers Home Administration. To secure the indebtedness, Johnson executed three security agreements which covered all livestock he owned or thereafter acquired "Together with all increases, replacements, substitutions, and additions thereto." Said agreements are believed to have been executed in Mississippi. Financing statements covering livestock were filed by the United States in the office of the Chancery Court for DeSoto County, Mississippi, on August 26, 1969, and on September 20, 1970, showing the United States as secured party and Johnson as debtor.

Between October 20, 1970, and December 20, 1972, Burnette-Carter, a livestock commission broker, made forty-four (44) sales of cattle in Shelby County, Tennessee, for the account of George T. Johnson, which cattle had been delivered to South Memphis Stockyards and consigned to Burnette-Carter for sale. Johnson failed to apply the proceeds of the sale toward the satisfaction of the indebtedness thereby depriving the United States of its security. The sales were made by Burnette-Carter without knowledge that Johnson was indebted to the United States and without knowledge that the United States claimed a lien on said cattle.

As of February 27, 1976, the United States had not filed a financing statement in the Register's Office of Shelby County,

Tennessee, with respect to the security interests arising out of the security agreements entered into with George T. Johnson.

The basis for Burnette-Carter's motion for summary judgment was that the security interests allegedly perfected in Mississippi were defective in that they became unperfected because the United States failed to file a financing statement in Tennessee within four months following the removal of the cattle to Tennessee as required by T.C.A. 47-9-103(3) and thus could not serve as the basis for the United States' action for conversion.

The District Court granted Burnette-Carter's motion for summary judgment on the grounds that T.C.A. § 47-9-103(3) clearly required a secured party to file a financing statement in the state where the security had been moved within the prescribed four-month period lest superior status be lost; consequently, the United States had a superior status as a secured party with a perfected security interest during the initial four-month period while the cattle were in Tennessee, but Burnette-Carter's claim as a bona fide purchaser without notice became superior to the United States' claim upon the expiration of the four-month period without the United States' filing a financing statement in Tennessee.

The United States appealed to the United States Court of Appeals for the Sixth Circuit which reversed the district court on the grounds that federal common law applied to determine the validity of the United States' security interest in the cattle sold by Burnette-Carter for the account of George T. Johnson. The appellate court relied upon the Uniform Commercial Code as the source of federal common law and held that UCC § 9-103(3) (1962 Official Text) gave the United States' security interests four months of absolute protection from the time cattle subject to said interests entered Tennessee from Mississippi.

REASONS WHY PETITION FOR CERTIORARI SHOULD BE GRANTED

1. The Decision of the Circuit Court of Appeals for the Sixth Circuit Is in Conflict With Decisions of Other Courts of Appeal.

The United States Court of Appeals for the Sixth Circuit, relying upon its decision in *United States v. Carson*, 372 F.2d 429 (6th Cir. 1967), held that federal common law applied to determine the validity of the United States' security interest granted by George T. Johnson. The aforesaid decision is in conflict with decisions of the Fourth and Eighth Circuits: viz *United States v. Chappel Livestock Auction, Inc.*, 523 F.2d 840 (8th Cir. 1975); *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962); *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956); but it is in accord with decisions of the Third, Fifth, Ninth and Tenth Circuits, viz *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971); *Cassidy Commission Co. v. United States*, 387 F.2d 875 (10th Cir. 1967); *United States v. Sommerville*, 324 F.2d 712 (3d Cir. 1963), *cert. den.* 376 U.S. 909 (1964); *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957).

In the case which the Sixth Circuit relied upon, *United States v. Carson*, *supra*, the defendant obtained a loan under the Bankhead-Jones Farm Tenant Act and executed a note payable to the United States which was secured by a mortgage as evidenced by a duly recorded "Mississippi Chattel Deed of Trust" on livestock located in Mississippi. Carson delivered to a Tennessee livestock broker cattle subject to the mortgage. The broker sold the cattle in Tennessee, and remitted the sales proceeds, less commissions and an advance, to Carson. The government brought suit against Carson and against the broker for conversion. The district Court ruled that the measure of damages for the broker's

liability for conversion was determined by state law which measure was the amount of the commission and advance which he retained and deducted from the proceeds from sale. The government appealed and argued that federal law governed the measure of damages. The court recognized that the issue before it was "... the extent of liability to be imposed when government property is tortiously mishandled in a commercial situation . . ." 372 F.2d 429, at 434, and held that the measure of damages was the fair market value of the property at the time the conversion took place. The Court further held that an auctioneer is liable for conversion to a holder of a security interest in property which he sells even if unaware of its existence.

In *United States v. Chappel Livestock Auction, Inc., supra*, the United States had loaned money to farmers through Farmers Home Administration. The farmers granted security interests in their cattle and financing statements were filed. The defendant livestock auctioneer sold said encumbered cattle and the government sued the auctioneer for conversion. The district Court held that state law applied and granted summary judgment for the broker. On appeal, the Eighth Circuit affirmed the district court and held that Nebraska law governed the liability of the livestock broker for conversion.

In *United States v. Union Livestock Sales Company, supra*, a farmer executed a chattel mortgage in favor of the Farmers Home Administration which was duly recorded in Ohio. The defendant livestock auctioneer sold in West Virginia two cows subject to the chattel mortgage and the government sued the auctioneer. The district court did not decide whether federal or state law applied because it thought the defendant liable under either. The defendant broker appealed to the Fourth Circuit which held that West Virginia law applied and affirmed the lower Court's judgment for the government. The Fourth Circuit found no need for uniformity in FHA loan transactions and thought that the purpose of the Statute to give assistance to

farmers could be promoted if loans were made in accordance with local practice and that both parties to the loan transactions would be properly protected if local rules familiar to courts and citizens were given application.

In *United States v. Kramel, supra*, the government sued for conversion of a cow subject to a chattel mortgage in favor of the Farmers Home Administration. The district court dismissed the government's complaint on the grounds that, under Missouri law (where all transactions with the defendant occurred) the defendant could not be liable for conversion. On appeal, the Eighth Circuit held that state law applied and held that the tort of conversion was not within the purview of the Bankhead-Jones Farm Tenant Act so as to be governed by it and found no compelling reason to construe an act of Congress as replacing state tort law.

This Court should resolve the conflict between the decision of the Sixth Circuit and the decisions above discussed of the Fourth and Eighth Circuits.

2. The Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law Which Has Not Yet Been, But Which Should Be, Settled by This Court.

The Sixth Circuit has decided that because the government loaned money to a farmer, which loan was secured and with respect to which a financing statement was filed, federal law applies to determine whether a third party has tortiously interfered with the government's property interests granted by the farmer. It held that a uniform federal rule is needed in Farmers Home Administration security cases, and relied upon its decision in *United States v. Carson, supra*.

In searching for the federal rule to be applied to this case, the Sixth Circuit looked to the Uniform Commercial Code §9-103

(3) and to the cases decided by the various states. Section 9-103(3) (1962 Official Text) provides in pertinent part:

If personal property other than that governed by sub-sections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. * * *

If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state. The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. * * *

There is ambiguity in the above referenced §9-103(3) with respect to what the clause "if within the four month period it is perfected in this state" modifies. Burnette-Carter argued that the government had four months from the time cattle subject to the government's security interest entered Tennessee to file a financing statement in Tennessee. The United States argued that its security interest was absolutely protected for four months after said cattle entered Tennessee and it did not have to file a financing statement within the four month period. The Sixth Circuit, having held that a uniform federal rule should govern the case, looked to state court decisions for insight into what the federal rule should be, and, in so doing, merely added up the cases that were favorable to the government and added up the cases favorable to Burnette-Carter, and then ruled for the government. It did not consider the fact patterns involved in the state decisions nor did it consider the grammatical structure of §9-103(3) itself. In fact the Court stated: "Nor do we need

to decide which viewpoint we would prefer if we wrote on a clean slate. Prior cases compel us to adopt a uniform result in Farmers Home Administration cases, which we read to require application of the UCC. The UCC in turn militates in favor of uniformity. These factors clearly point toward our adoption of the majority interpretation of §9-103(3) . . ." 575 F.2d 587, at 591-592.

The Court should have given consideration to §9-103(3) itself once it decided that such provision was the source of federal law. The Court decided that said provision was the source of federal law, but failed to decide what the words comprising said provision meant and surrendered its opinion for the opinion of state courts involving other fact patterns.

The Court did recognize that the "majority view" could be changed by legislative as well as by judicial pronouncements and noted that sixteen states had adopted the 1972 amendments to U.C.C. §9-103, which would, if applied in this case, have resulted in judgment for Burnette-Carter. 575 F.2d 587, at 592. It is important to note that forty-nine states and the District of Columbia adopted U.C.C. §9-103(3), 4 Anderson, *Uniform Commercial Code* § 9-103: 3, p. 43, and, currently twenty-one states have adopted the 1972 amendment to U.C.C. §9-103(3). 1 CCH *Secured Transactions Guide*, ¶ 803, Pages 4507-4510. Thus, twenty-eight states still are operating under U.C.C. §9-103(3), viewed by the Sixth Circuit as the source of federal common law.

This court has not decided the issue of whether federal common law applies in cases where the United States brings a cause of action in tort for the conversion of property in which it has a security interest granted by a borrower of funds under the Bankhead-Jones Farm Tenant Act, nor has it decided what the federal common law is. Such questions should be decided by this Court.

CONCLUSION

For reasons set forth above, it is submitted that the Petition for Certiorari be granted, to review the decision of the United States Court of Appeals for the Sixth Circuit.

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APPENDIX

— A-1 —

United States District Court
for the
Western District of Tennessee
Western Division

United States of America	}	Civil Action File No. C-75-556
v.		
Burnette-Carter Company		

JUDGMENT

(Filed May 19, 1976)

This action came on for trial (* * *) before the Court, Honorable Bailey Brown, United States District Judge, presiding, and the issues having been duly * * * (heard) and a decision having been duly rendered, in favor of the defendant.

It is Ordered and Adjudged that the defendant's motion for summary judgment is GRANTED and the case DISMISSED.

Dated at Memphis, Tennessee, this 19th day of May, 1976.

/s/ J. FRANKLIN REID
Clerk of the Court

In the United States District Court
For the Western District of Tennessee
Western Division

United States of America,	} Plaintiff,	Civil C-75-556
v.		
Burnette-Carter Company,		
	Defendant.	

**ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND DIRECTING
ENTRY OF FINAL JUDGMENT**

(Filed May 19, 1976)

This case is before the court on cross motions for summary judgment filed on behalf of the plaintiff, United States of America, and the defendant, Burnette-Carter Company. We conclude that there are no genuine issues of material fact and that this is a proper case for summary judgment. For the reasons hereinafter stated we grant defendant's motion.

This is an action to recover damages for the conversion of mortgaged property. For a valuable consideration and to evidence three loans obtained from the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, Mr. George T. Johnson executed three promissory notes on August 11, 1969 in the amount of \$18,070.00, August 13, 1970 in the amount of \$4,000.00 and on September 20, 1972 in the amount of \$11,600.00. To secure the above indebtedness Johnson executed security agreements on August 26, 1969, October 18, 1971 and September

20, 1972. And, Financing statements were filed on August 26, 1969, and September 20, 1972 in the office of the Chancery Court Clerk for DeSoto County, Mississippi. The security agreements and financing statements covered *inter alia* livestock then owned or after acquired by Johnson together with all increases, replacements, substitutes and additions thereto including the proceeds and products thereof.

Between the dates of October 20, 1970 and December 20, 1972 Johnson had delivered eighty-seven head of cattle to the South Memphis Stock Yards in Memphis, Tennessee. The cattle were ultimately consigned to Burnette-Carter Company for sale and were eventually sold by Burnette-Carter Company who received a commission from the sale; Johnson received the remainder of the proceeds of the sale. The cattle were sold for a total price of \$16,484.06 of which amount Burnette-Carter received \$176.30 in commissions. All the cattle which Johnson had delivered to South Memphis Stock Yards and which were sold by Burnette-Carter were covered by the Security Agreement and Financing Statement executed by Johnson. Johnson did not apply the proceeds of the sales toward the satisfaction of his indebtedness to the FHA and thereby deprived FHA of their security. After a period of non-payment the FHA accelerated the balance due on the notes and demanded payment. All the remaining security was liquidated and the proceeds applied to the indebtedness but there remains an outstanding balance of \$15,489.50. The U.S.A. filed this action against Burnette-Carter on the theory that the sales by Burnette-Carter constituted conversion of plaintiff's property. Defendant, Burnette-Carter, has filed its motion for summary judgment citing numerous grounds why judgment should be granted in its behalf; we address those grounds *seriatim*.

Defendant first contends that this action should be dismissed because plaintiff has failed to join an indispensable party, i.e. South Memphis Stock Yards Co. From the present state of the

record we are not convinced that South Memphis Stock Yards Co. is an indispensable party. It appears that South Memphis Stock Yards Co. was simply a conduit, and while we agree they could have been joined we do not see them as a necessary party.

Defendant next contends that this action is barred by the three year statute of limitation found in 28 U.S.C.A. § 2415(b). That section provides in relevant part:

“(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues; Provided, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues . . .”

Defendant argues that a security interest is not property within the meaning of § 2415(b) and therefore the six year statute of limitation for conversion does not apply here. We disagree. Two recent cases have discussed this issue and both have held contra to the defendant's position. *United States v. Squires*, 378 F.Supp. 798 (S.D. Iowa 1974); *United States v. Southland Provision Company*, 320 F.Supp. 1089 (M.D. Fla. 1970). In very well reasoned opinions the *Squires* and *Southland* courts gave the word “property” a broad meaning and concluded that it covered security interests. They further concluded that the six year statute of limitations applied. We adopt the reasoning

of those courts and also conclude that the six year statute of limitations applies in the instant case.

Defendant also contends that because the government took an unreasonable and unexplained length of time to defendant's prejudice, the government's claim is barred by laches. While there appears to have been a substantial amount of time between the dates of the sale and the date this case was filed, we do not feel that this fact alone would subject the government's claim to laches. We think that among other reasons the question of laches involves fact questions that cannot be resolved on the present state of this record.

Defendant next argues that the government filed suit one year after the first financing statement expired and that the government therefore could not make a claim for the livestock covered thereunder. We disagree. The alleged acts of conversion occurred during the five year period the subject financing statement was in effect and if the statement was properly filed during that time the government in our view should be entitled to rely on it.

Defendant argues that the financing statement filed on September 20, 1972 did not contain any real estate description as required by Mississippi Code Annotated § 75-9-402 and therefore the government cannot rely on that financing statement. Again we disagree. Section 75-9-402 requires that the financing statement contain a real estate description before the statement will effectively cover crops growing or to be grown or goods which are to or thereafter become fixtures. We are concerned here with livestock which does not necessitate a real estate description.

Defendant finally argues that because the government failed to file a financing statement in Tennessee within four months after the subject livestock were brought to this state, the govern-

ment's interest became junior to that of the defendant's. With this argument we agree. Tennessee Code Annotated § 47-9-103(3) provides in relevant part:

"If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four (4) months *and also thereafter if within the four (4) month period it is perfected in this state.*" [Emphasis supplied.]

Mississippi Code Annotated § 75-9-103(3) is identical in this respect. This statute clearly requires a secured party to file a financing statement in the state to which his security has been moved within four months lest he lose his superior status. The government concedes that a financing statement was not filed in Tennessee but argues that since the livestock were sold within the four month period, their interest was superior to that of the defendant. While there is some case law to support the government's view, *see, e.g., Utah Farm Production Credit Ass'n v. Dinner*, 302 F.Supp. 897 (D. Colo. 1969), we think the better view is to the contrary. We conclude that the government's claim was superior to that of the defendant's during the initial four month period the livestock were in Tennessee, but when that initial four months expired without the government filing a statement in Tennessee the defendant, being a bona fide purchaser without notice, became superior to the plaintiff. *United States v. Squires, supra*; T.C.A. § 47-9-103 Comment 7; J. White and R. Summers, Uniform Commercial Code § 23-18 pp. 847-49. The purpose of the statute would not be served if a creditor who did not file his financing statement within the four month period could come into court and claim a superior status to that of one who purchased without notice within the four month period. We conclude that the defendant has the superior claim and cannot be charged with conversion of plaintiff's property.

Accordingly, defendant's motion for summary judgment shall be granted.

The Clerk shall enter a final judgment granting summary judgment to the defendant.

It is so ORDERED.

ENTER this 18 day of May, 1976.

/s/ BAILEY BROWN
Chief Judge

No. 76-2109

United States Court of Appeals
for the Sixth Circuit

United States of America,	} Appeal from the
Plaintiff-Appellant,	
v.	
Burnette-Carter Company,	
Defendant-Appellee.	United States District Court for the West- ern District of Ten- nessee, Western Divi- sion.

Decided and Filed May 15, 1978

Before: Edwards, Celebrezze and Lively, Circuit Judges.

Celebrezze, Circuit Judge. This is an appeal by the United States from a summary judgment granted to defendant-appellee Burnette-Carter Company. The complaint was filed on behalf of the Farmer's Home Administration of the United States Department of Agriculture (FmHA) and alleged that Burnette-Carter converted certain livestock subject to an FmHA security interest.¹ The primary issue on appeal is the validity of the security interest vis-a-vis Burnette-Carter under Uniform Commercial Code (UCC) § 9-103(3) (1962 Official Text).² We hold that the security interest was valid and reverse the judgment below.

¹ Federal jurisdiction was based on 28 U.S.C. §1345.

² UCC § 9-103(3) (1962 Official Text):

If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the

Both parties moved the district court for summary judgment and the relevant facts are not in dispute. The FmHA made a loan to a Mississippi farmer, not a party to this action, pursuant to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1941 *et seq.* A financing statement was filed and all other steps were taken to properly perfect a security interest in Mississippi covering all of the farmer's livestock. Without the knowledge or approval of the FmHA, the farmer shipped the livestock from Mississippi to Tennessee (the "removal state") to be sold. The livestock were sold to bona fide purchasers at auction by Burnette-Carter, a Memphis commission livestock broker. There were several sales in this manner over two years, each sale occurring within four months of removal into Tennessee. The farmer did not apply any of the sale proceeds to the loan and defaulted on his loan repayments. The FmHA took no action to perfect its security interest in Tennessee.

The district court held that the FmHA could not recover in conversion since it had not filed a financing statement in Ten-

conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. *If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, the security interest continues perfected in this state for four months and also thereafter if within the four month period it is perfected in this state.* The security interest may also be perfected in this state after the expiration of the four month period; in such case perfection dates from the time of perfection in this state. If the security interest was not perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state, it may be perfected in this state; in such case perfection dates from the time of perfection in this state. (Emphasis added).

nessee within four months of the collateral's removal. The court reasoned that UCC § 9-103(3), as codified in TENN. CODE ANN. § 47-9-103(3), required a secured party to file a financing statement in the removal state within the four month period and that absent such filing the security interest was deemed unperfected in the removal state retroactive to the date of the collateral's removal. Under this reasoning, the security interest was not perfected as to Burnette-Carter, and it could not be held liable for conversion. The FmHA argues that UCC § 9-103(3) gives four months of absolute protection to the secured party upon removal of the collateral, even without refiling in the removal state, and that its security interest was therefore valid at the time of the sales in question.

There is no dispute that the FmHA is entitled to recover if it had a valid security interest at the time and place of sale. This court has held, on almost identical facts, that a livestock auctioneer who unauthorizedly sells property subject to a third party's security interest is liable in conversion to that third party even if the auctioneer has no knowledge of the security interest. *United States v. Carson*, 372 F.2d 429, 435 (6th Cir. 1967). The appropriate measure of damages is the fair market value of the collateral at the time of the conversion. *Id.* Other circuits have uniformly reached the same conclusion on similar facts.³ *United States v. E. W. Savage & Son, Inc.*, 475 F.2d 305 (8th Cir. 1973); *Cassidy Commission Co. v. United States*, 387 F.2d 875 (10th Cir. 1967); *United States v. Sommerville*, 324 F.2d 712 (3d Cir. 1963), *cert. den.* 376 U.S. 909 (1964); *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962); *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957). See also *United States v. Topeka Livestock Auction, Inc.*, 392 F. Supp. 944 (N.D. Ind. 1975). This is also the clear majority rule among

³ Some of these cases rely on state law while others espoused a federal common law rule. See text accompanying note 4, *infra*.

the states. *Annot.*, 96 A.L.R. 2d 208, §§ 3 and 7; 3 C.J.S. Agency § 383.

We must now focus on whether the FmHA's security interest was valid vis-a-vis Burnette-Carter. There is a split among the circuits as to whether the federal courts should look to state law in making this determination or fashion a uniform federal rule. Following the dictates of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), this court has held that a uniform federal rule is appropriate in FmHA security interest cases.⁴ *United States v. Carson*, 372 F.2d 429, 431-35 (6th Cir. 1967). *Accord*, *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971); *Cassidy Commission Co. v. United States*, 387 F.2d 875 (10th Cir. 1967); *United States v. Sommerville*, 324 F.2d 712 (3d Cir. 1963), *cert. den.* 376 U.S. 909 (1964); *United States v. Matthews*, 244 F.2d 626 (9th Cir. 1957). *Contra*, *United States v. Chappel Livestock Auction, Inc.*, 523 F.2d 840 (8th Cir. 1975); *United States v. Union Livestock Sales Co.*, 298 F.2d 755 (4th Cir. 1962); *United States v. Kramel*, 234 F.2d 577 (8th Cir. 1956). This does not mean that this court should ignore relevant state law; it simply means that we are not bound by state law as we are in diversity of citizenship cases under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Indeed, in *Carson* we followed the substantive rule adopted in two other circuits but added:

We also take note of the fact that this rule is followed in nearly all the states. The formulation of a uniform federal rule does not require that the wisdom of the states be disregarded, and the federal rule may correspond to the rule applied in many states.

372 F.2d at 435

⁴ The district court opinion indicates it felt that state law controls in FmHA cases. This was erroneous. Appellee's brief in this court also asserts that state law controls, omitting any mention of our unambiguous decision in *Carson*. Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY. DR 7-106(B)(1).

The Fifth Circuit, which also opts for a uniform federal rule in FmHA cases, employed the following analysis in determining the applicable federal rule:

Having decided that federal law must apply to the litigation at bar, we nevertheless see no reason nor necessity for fashioning a specialized, esoteric body of federal law, confined in terms to suits by the United States seeking to impose conversion liability on persons who deal with property mortgaged under the FHA loan program. An FHA loan is nothing more nor less than a secured transaction, with the United States as the secured party holding a security interest in property of the debtor in order to insure repayment of the loan. . . . We perceive no reason why the rights of the United States arising out of secured transactions pursuant to the FHA loan program should be any different than those of other financiers of farming operations under the Uniform Commercial Code. We have therefore determined that in fashioning the federal law that is applicable to suits arising from the FHA loan program we shall be guided by the principles set forth in Article 9 and other relevant portions of the Uniform Commercial Code.

Such a course meets the principal reason advanced for requiring a federal rule of decision in these cases, that of uniformity, while at the same time assuring that an individual state's modifications of the Code's scheme cannot be employed to defeat federal rights. . . . The Code has now been adopted in every state save Louisiana. By evaluating the issues involved in suits concerning FHA secured transactions in light of Article 9, the federal courts will have a coherent, unified body of law with which to deal and can benefit from the general body of precedent developed by the state courts under the Code. This is not to say, of course, that the interpretation of the Code made by any particular state court will be controlling nor

that any modification of the Code enacted by a particular state legislature need be followed. Such interpretations and modifications may be followed only if the federal courts deem them reflective of the weight of authority, consistent with the operation to the FHA program, or desirable as precedent.

On this basis it is our judgment that the Code itself and the general body of precedent developed by the Code states provide the most logical source material supplying the content of federal common law to govern suits arising from FHA secured transactions. In this fashion the federal law governing FHA loans and the state law of secured transactions will coalesce to reinforce each other.

United States v. Hext, 444 F.2d 804, 809-11 (5th Cir. 1971) (footnotes omitted but commended to the reader) (FHA is the same as FmHA).

See also *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700, 703 n.1 (10th Cir. 1972), and *United States v. Topeka Livestock Auction, Inc.*, 392 F.Supp. 944 (N.D. Ind. 1975).

We agree with the reasoning of the Fifth Circuit that the UCC should be adopted as the relevant federal common law. It would be particularly anomalous not to apply the UCC when the FmHA, whose interests are meant to be protected by a uniform federal rule, does not object to its application. The FmHA perfects its security interests pursuant to the UCC as adopted in the respective states.⁵ The agency does not even suggest that we look to other sources of law. Congress has

⁵ Since there is no federal filing system to perfect such security interests, it has been held that the original perfection thereof is governed by state law even in circuits otherwise applying federal law. *Cassidy Commission Co. v. United States*, 387 F.2d 875, 879 (10th Cir. 1967); *United States v. Sommerville*, 324 F.2d 712, 717 (3d Cir. 1963). We agree.

expressed approval of the principles of the UCC in adopting it for the District of Columbia.⁶

Our task in deciding this and like cases is thus simply to apply the rules found in "the Code itself and the general body of precedent developed by the Code states." *Hext*, 444 F.2d at 811. If there is lack of uniformity on a particular issue, either by virtue of non-uniform changes in the UCC or differing interpretations of a uniform provision, we will normally follow the "weight of authority." *Id.* It is essential that federal courts not follow aberrational UCC interpretations since uniformity is the *raison d'être* applying federal and not state law. Moreover, once we determine that we should follow the UCC, we are obliged by UCC § 1-102(1) & (2) (c)⁷ to promote uniformity.

Examination of the interpretations of the four month protection found in UCC § 103(3) (1962 Official Text) reveals two differing views. One gives the secured party four months of absolute protection in the removal state, and the other gives him four months of conditional protection, the condition being refiling in the removal state within that four months. The absolute protection version is favored by the overwhelming

⁶ Public Law 88-243, D.C.C.E. §§ 28:1-101 to 28:10-104. This is not controlling in this case but is persuasive authority in our search for the federal common law.

⁷ UCC § 1-102:

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

* * *

(c) to make uniform the law among the various jurisdictions.

weight of authority in both the cases⁸ and commentary⁹ and for the reasons stated above we adopt it here. This view gives the secured party four months of protection in the removal state without the necessity of any additional filing there at any time. Thus, so long as the secured interest was properly perfected in the original state, it remains perfected vis-a-vis persons dealing with the collateral within four months of removal, such as *Burnette-Carter*. There is no retroactive lapse of perfection if no filing is made in the removal state within four months—the security interest lapses only at the end of four months.

The minority interpretation of UCC § 9-103(3) reads the section as giving the secured party only conditional protection

⁸ The following cases follow the absolute protection version: *American State Bank v. White*, 217 Kan. 78, 535 P.2d 424 (1975); *City Bank & Trust Co. v. Warthen Service Co.*, 91 Nev. 293, 535 P.2d 162 (1975); *Community Credit Co. v. Gillham*, 191 Neb. 198, 214 N.W.2d 384 (1974); *General Motors Acceptance Corp. v. Long-Lewis Hardware Co.*, 54 Ala. App. 188, 306 So.2d 277 (1974); *Morris v. Seattle-First National Bank*, 10 Wash. App. 129, 516 P.2d 1055 (1973); *First Bristol County National Bank v. Shirley*, 11 U.C.C. Rep. 378 (Tenn. App. 1972); *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228, 327 N.Y.S. 2d 77 (1971), *aff'd without opinion* 75 Misc.2d 103, 347 N.Y.S. 2d 568 (1972); *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 454 S.W.2d 465 (Tex. Civ. App. 1970), *aff'd on other grounds* 465 S.W.2d 933 (Tex. 1971); *Pasack Valley Bank & Trust Co. v. Ritar Rord, Inc.*, 6 Conn. Cir. 489, 276 A.2d 800 (1970); *Utah Farm Production Credit Association v. Dinner*, 302 F. Supp. 897 (D. Colo. 1969); *First National Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966); *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965); *Churchill Motors, Inc. v. A. C. Lohman, Inc.*, 16 App. Div.2d 560, 229 N.Y.S.2d 570 (1962).

The following cases have preferred the conditional protection version: *Arrow Ford, Inc. v. Western Landscape Construction Co.*, 23 Ariz. App. 281, 532 P.2d 553 (1975); *United States v. Squires*, 378 F.Supp. 798 (S.D. Iowa 1974).

⁹ The following commentators assert that § 9-103(3) gives four months of absolute protection, although not all agree that that is

for four months.¹⁰ The four months is a grace period and protection vis-a-vis persons dealing with the collateral during the four months is conditioned upon filing in the removal state within four months. Absent such perfection in the removal state, the security interest lapses retroactive to the date of removal.

The relative merits of these competing interpretations of UCC § 9-103(3) are discussed elsewhere and need not be repeated here.¹¹ Nor do we need to decide which viewpoint we would prefer if we wrote on a clean slate. Prior cases compel us to adopt a uniform result in FmHA cases, which we read to require application of the UCC. The UCC in turn militates in favor of uniformity. These factors clearly point toward our adoption of the majority interpretation of § 9-103(3). Only the existence of some unique federal interest would lead us to deviate from the "weight of authority" under the UCC. No such special interest appears.

the better rule: Gilmore, *Security Interests in Personal Property*, § 22.8, pp. 626-27 (1965); 4 Anderson, *Uniform Commercial Code* (2d ed.) § 9-103:16; Note, *Resolving Conflicts Arising From the Interstate Movement of Motor Vehicles: The Original UCC § 9-103 And Its Successor*, 35 Ohio St. L.J. 990, 992 n. 8 & 996 n. 27 (1974); Coogan, *The New UCC Article 9*, 86 Harv. L. Rev. 477, 535 (1973); Headrick, *The New Article Nine of the Uniform Commercial Code: An Introduction and Critique*, 34 Mont. L. Rev. 218, 240 (1973); Hawkland, *The Proposed Amendments to Article 9 of the UCC—Part 6: Conflict of Laws and Multistate Transactions*, 77 Com. L.J. 145, 150-51 (1972); Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code*, 68 Mich. L. Rev. 684, 713 (1970).

The following commentators support the conditional protection version of § 9-103(3): White and Summers, *Uniform Commercial Code*, pp. 848-49 (1972); Vernon, *Recorded Chattel Security Interests in the Conflict of Laws*, 47 Iowa L. Rev. 346, 377-78 (1962). See also UCC § 9-103, Comment 7 (1962 Official Text).

¹⁰ See notes 8 and 9 *supra*.

¹¹ *Id.*

We note that the 1972 amendments to the UCC totally rewrite § 9-103. UCC § 9-103(1)(d)(i)¹² (1972 Official Text) clearly adopts the conditional protection version of the four month rule. The conversion complained of here, however, occurred between October, 1970, and December, 1972, before any

¹² UCC § 9-103(1) (1972 Official Text):

(a) This subsection applies to documents and instruments and to goods other than those covered by a certificate of title described in subsection (2), mobile goods described in subsection (3), and minerals described in subsection (5).

(b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest in collateral are governed by the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.

(c) If the parties to a transaction creating a purchase money security interest in goods in one jurisdiction understand at the time that the security interest attaches that the goods will be kept in another jurisdiction, then the law of the other jurisdiction governs the perfection and the effect of perfection or non-perfection of the security interest from the time it attaches until thirty days after the debtor receives possession of the goods and thereafter if the goods are taken to the other jurisdiction before the end of the thirty-day period.

(d) *When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by Part 3 of this Article to perfect the security interest,*

(i) *if the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal;*

(ii) *if the action is taken before the expiration of the period specified in subparagraph (i), the security interest continues perfected thereafter;*

(iii) *for the purpose of priority over a buyer of consumer goods (subsection (2) of Section 9-307), the period of the effectiveness of a filing in the jurisdiction from which the collateral is removed is governed by the rules with respect to perfection in subparagraphs (i) and (ii). (Emphasis added).*

state had adopted the 1972 Amendments.¹³ Not until a majority of jurisdictions accept this change in the law can the amendment be said to represent the prevailing view. If and when that occurs, it would require a different result in a case such as this. Judgment for one in Burnette-Carter's position would then be altogether appropriate since it would continue to serve the ultimate purpose of uniformity in FmHA cases. Presumably the FmHA would then be on notice of the change in the prevailing law and could act accordingly. But until then, the FmHA is entitled to rely on the current prevailing interpretation of the law.¹⁴

For the reasons stated herein, the judgment of the district court is reversed and the cause is remanded to that court with directions to enter judgment in favor of the United States.

¹³ 3 Uniform Laws Annotated, Uniform Commercial Code 2-3 (1977 Pamphlet).

At least sixteen states have since adopted the 1972 amendments to UCC Article 9. *Id.*

¹⁴ Given the apparent pending change in the majority rule, *see* note 13, *supra*, the FmHA would be prudent to operate under the conditional protection rule in the very near future.

No. 76-2109

United States Court of Appeals
for the Sixth Circuit

United States of America,	}
Plaintiff-Appellant,	
v.	
Burnette-Carter Company,	}
Defendant-Appellee.	

ORDER

(Filed July 5, 1978)

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit
Judges.

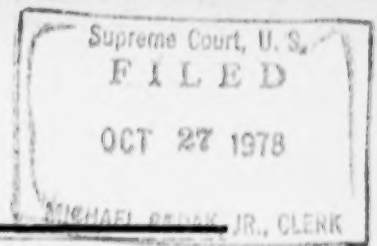
Appellee filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 78-257



In the Supreme Court of the United States

OCTOBER TERM, 1978

BURNETTE-CARTER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The government brought this action to recover damages for the conversion of property in which it held a security interest (Pet. App. A-8). Petitioner, a commission livestock broker, contends that the court of appeals erred in holding that the government's security interest in the property petitioner sold on behalf of the debtor was perfected.

1. Pursuant to its authority under 7 U.S.C. 1941 *et seq.*, the Farmers Home Administration (FmHA) executed three loan agreements with George T. Johnson, for a total of \$33,670 (Pet. App. A-2). To secure this indebtedness, Johnson executed three security agreements, covering, *inter alia*, all the livestock that he then owned or would later acquire (*id.* at A-3). These agreements were executed in Mississippi, where the

property was located, and financing statements were filed in the Office of the Chancery Court Clerk for DeSoto County, Mississippi (*ibid.*). The FmHA's security interests became perfected under state law at the time of filing. See Miss. Code Ann. §§ 75-9-302, 75-9-303 (1972).

Without the knowledge or approval of the FmHA, Johnson delivered 87 head of cattle covered by the security agreements to the South Memphis Stock Yards in Memphis, Tennessee (Pet. App. A-3). The cattle were consigned to petitioner, which sold them at auction for a total of \$16,484.06 (Pet. App. A-3, A-9). These sales were completed within four months of the time the cattle were shipped into Tennessee (*id.* at A-9).

Johnson did not apply the sale proceeds to the satisfaction of the indebtedness, and he defaulted on his loan repayments (*id.* at A-3, A-9). Eventually the FmHA liquidated the remaining security and applied the proceeds to the indebtedness, leaving a balance of \$15,489.50 outstanding (*ibid.*).

2. The United States then filed this action alleging that petitioner had converted property (the 87 head of cattle covered by the FmHA security agreements) and seeking damages in the amount of the proceeds of the sale (*id.* at A-3).

Finding no dispute about the facts of the case, the district court granted petitioner's motion for summary judgment. The court concluded that under Tennessee law, Tenn. Code Ann. § 47-9-103(3) (1964),¹ because the government's out-of-state security interest was not

¹Tenn. Code Ann. § 47-9-103(3) (1964), and the statute in force at the time of the events in question, Miss. Code Ann. § 75-9-103(3) (1972), are almost identical to § 9-103(3) of the Uniform Commercial Code (1962 version). The Mississippi statute was subsequently amended, see note 3, *infra*.

reperfected in Tennessee within four months after the covered property was brought into the state, it was inferior to interests subsequently acquired in Tennessee (Pet. App. A-5 to A-6).

The court of appeals reversed, holding that the government's security interest was valid even though it had not been reperfected in Tennessee (*id.* at A-8 to A-18). The court of appeals observed that the parties agreed that if the FmHA's security interest was valid at the time and place of sale, then petitioner is liable in conversion, whether or not it had knowledge of the security interest (*id.* at A-10). The court held that the validity of the FmHA's security interest is governed by federal law, and it concluded that the Uniform Commercial Code is the source of the relevant federal common law (*id.* at A-11 to A-13). Following the weight of the authority interpreting U.C.C. § 9-103(3) (1962 version), the court held that a security interest perfected in one state remains valid for four months, even if not reperfected in the state to which the security is removed.

3. Petitioner urges (Pet. 5-7) that the Court should grant review to resolve a conflict among the circuits on the question whether federal or state law controls the validity and priority of government security interests. Compare *United States v. Carson*, 372 F. 2d 429, 431-435 (6th Cir. 1967), and *United States v. Hext*, 444 F. 2d 804 (5th Cir. 1971), with *United States v. Chappell Livestock Auction, Inc.*, 523 F. 2d 840 (8th Cir. 1975). But the asserted conflict, provides no justification for granting review in the instant case because the choice of law question is irrelevant.² Although the court of appeals applied federal

²The Court has granted review in two cases that involve the priority of federal and state liens. *United States v. Kimbell Foods, Inc.*, cert. granted, No. 77-1359 (May 15, 1978); *United States v. Crittenden*, cert. granted, No. 77-1644 (Oct. 2, 1978). Both cases come from the Fifth Circuit, and in both the court of appeals held, following

law, it concluded that the federal common law should be drawn from the Uniform Commercial Code, which has been adopted in 49 states. The court applied the 1962 version of U.C.C. § 9-103(3) that was in force in both Mississippi and Tennessee at the time of the events in question, and in interpreting that provision the court followed the overwhelming weight of authority. (Pet. App. A-15 to A-16 & nn.8-11). There is no reason to suppose that the courts of Mississippi and Tennessee, applying state law, would reach a conclusion other than the one reached by the federal court.

Alternatively, petitioner urges (Pet. 7-9) that review is warranted to correct the court of appeals' erroneous construction of § 9-103(3). But the court of appeals' decision is in accord with the substantial weight of authority (see Pet. App. A-14 to A-16). In any event, this question does not warrant review by this Court. As petitioner points out (Pet. 9; see Pet. App. A-18), a clarifying amendment to § 103 that disposes of the question petitioner presents was proposed in 1972 by the U.C.C. Permanent Editorial Board and has already been adopted by more than 20 states.³ Accordingly, the question is one of little prospective importance.

overwhelming precedent, that federal law controls questions of priority. Petitioner's argument (Pet. 5) that the decision here conflicts with the rule prevailing in the Fifth Circuit therefore is incorrect. There is no need, however, to hold the present petition pending the disposition of *Kimbell Foods* and *Crittenden*. Neither of those cases presents the question whether state law controls, and, for the reasons stated in the text, that question is immaterial even in the present case.

³Tennessee has not adopted this amendment. Mississippi enacted the clarifying amendment in 1977, to be effective beginning April 1, 1978. Miss. Code Ann. § 75-9-103(3)(e) (1978 Supp.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978